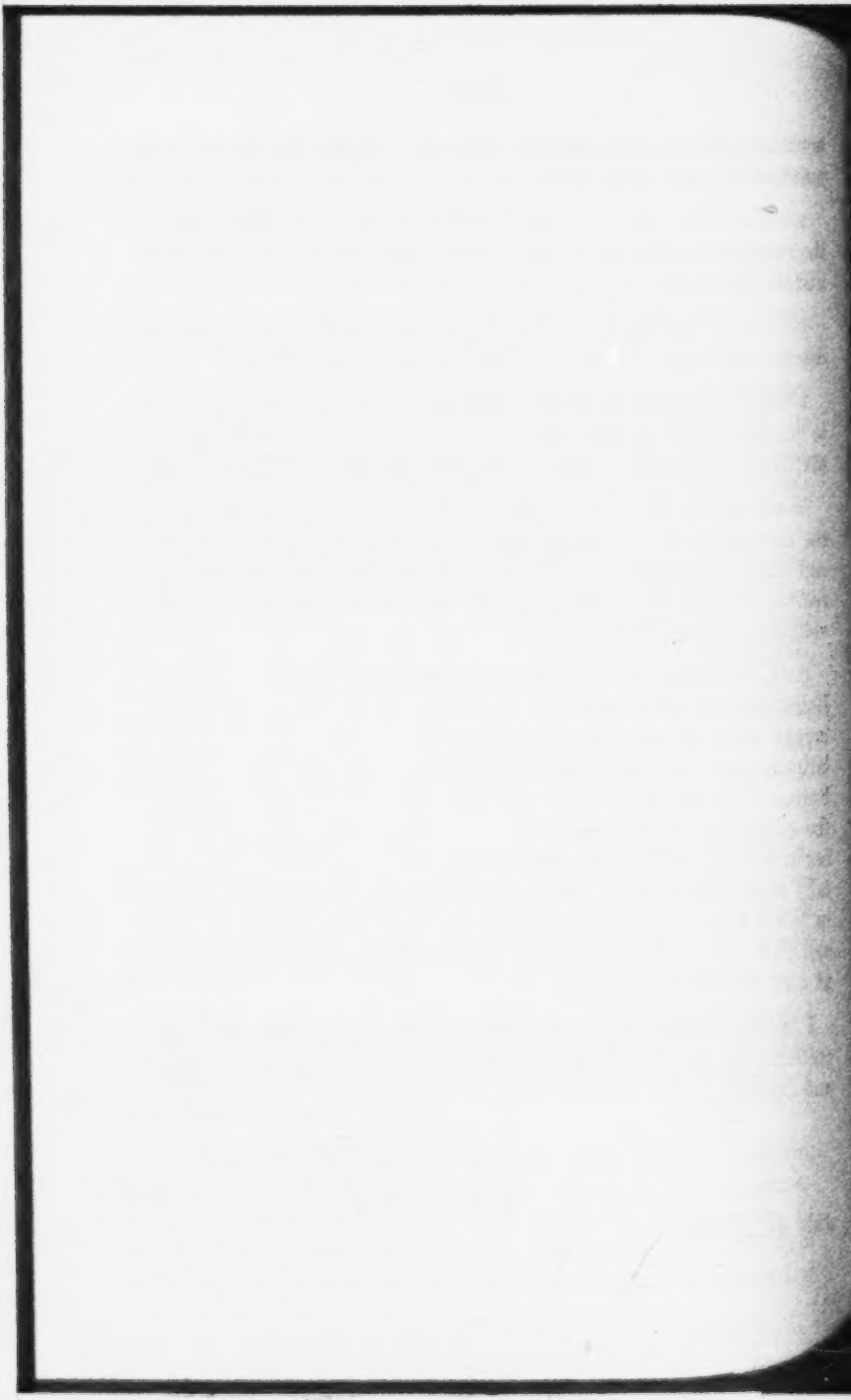

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 898

KOHLER COMPANY, PETITIONER

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA

AND

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–24a)[1] is not yet reported. The findings of fact, conclusions of law and order of the Board (J.A. 8–412) are reported at 128 NLRB 1062.

[1] "App." references are to the portions of the record printed in the separate appendix to the petition. "J.A." references are to the Joint Appendix printed for the use of the court below; references preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1962 (App. 25a). The petition for a writ of certiorari was filed on April 23, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether the Board and the court of appeals properly declined to reopen the proceeding for the purpose of adducing additional evidence on the issue whether a wage increase, which the employer granted without notice to or consultation with the union, was announced on April 5, 1954, rather than on June 1, 1954, as the Board found.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the unilateral wage increase of June 1, 1954, and the employer's subsequent unfair labor practices, prolonged an economic strike and converted it into an unfair labor practice strike.

3. Whether the court of appeals exceeded its reviewing powers under the Act in remanding the case to the Board for reconsideration of two issues: (a) whether the strike was in fact an unfair labor practice strike from its inception; and (b) whether 77 strikers, whom the Board found had engaged in mass picketing and related misconduct, should be ordered reinstated, when their misconduct is evaluated in the light of the unfair labor practices committed by the employer.

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STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 46a–50a of the Appendix to the petition.

STATEMENT

I

THE BOARD'S FINDING OF FACT[2]

A. THE COMPANY'S LABOR RELATIONS HISTORY

In 1952, Local 833, UAW–AFL–CIO, the respondent Union, was certified by the Board as the exclusive bargaining representative of petitioner Kohler's production and maintenance employees (J.A. 129–130). For 20 years prior thereto, the employees had been represented by the Kohler Workers Association, the formation of which was instigated and sponsored by Kohler and which was in effect a "company dominated" labor organization (J.A. 12, 129–130). From the inception of Local 833's organizing drive until its certification, Kohler displayed a hostile attitude towards it, and engaged in conduct which the Board found to constitute unfair labor practices (J.A. 13, 136).[3]

After the certification, the parties commenced negotiations, and agreement on a one-year collective bargaining contract was reached by February 1953

[2] The Board hearing extended over many months, over 20,000 pages of testimony were recorded, and over 1,000 exhibits were received.

[3] See *Kohler Co.*, 108 NLRB 207, enforced, *National Labor Relations Board* v. *Kohler*, 220 F. 2d 3 (C.A. 7).

(J.A. 13–14, 129; 1099–1100). These negotiations however, were not altogether harmonious. Authorization to strike was voted by the Union shortly before agreement was reached. In anticipation of the strike Kohler purchased guns, ammunition and tear gas, and also built a number of watchtowers within the plant enclosure (J.A. 13, 138; 1054–1058).[4] The contract was executed, however, without a work stoppage (J.A. 14, 137–138). The Union obtained a wage increase, including fringe benefits, estimated at 18¢ per hour, and certain concessions on arbitration and union security (J.A. 14, 137–138; 1100–1102).

The execution of the contract did not terminate the 1953 negotiations, for, pursuant to a three months' wage reopening clause in the contract, the Union requested reopening on May 23. Negotiations on the reopening proved fruitless until a strike authorization was again voted. Then, but only after the Company had initiated strike preparations similar to those of the preceding February, a three-cents increase was finally negotiated on August 20, retroactive to May 23. (J.A. 14, 138; 1066–1067, 1103–1104.)

B. THE NEGOTIATIONS IN 1954 PRIOR TO THE STRIKE OF APRIL 5

On February 2, 1954, negotiations for a new contract opened (J.A. 15, 141; 456–459). Bargaining continued throughout the month on a regular schedule on normal workdays of 9 a.m. to 5 p.m. (J.A. 15,

[4] The Union similarly made certain strike preparations, bringing in sound trucks from Detroit and equipping a strike kitchen to handle three meals per day (J.A. 13).

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141; 458–461).[5] The major issues before the parties were arbitration, union security, seniority, pensions, insurance (life, medical and hospitalization), wages and a paid lunch period in the enamel shop (J.A. 142; 462–463). Numerous proposals and counter-proposals were made, and, as found by the Board, "progress was made on some * * * [of these] issues by narrowing the area of disagreement" (J.A. 142, 16; 463, 468–469, 612–613).

On February 23, the Union called attention to the imminent expiration of the contract and requested a one-month extension to insure sufficient time for orderly bargaining. On February 25, Kohler rejected the proposal, and offered instead to extend the contract for one year without a wage increase, but with a provision for a quarterly wage reopening. The Union rejected this offer on the ground that it rendered useless all the time theretofore spent in the negotiations. (J.A. 16, 142–143, 170–171; 461–462, 464–465.) On February 26, Kohler then offered the Union a three-cent per hour increase conditioned on acceptance by the Union of the Company's contract offer of February 15, with such changes as had been agreed upon to date and with the existing pension and insurance plans to remain in effect (J.A. 16, 142–143, 171; 465–466, 602–603).[6] The Union re-

[5] The Union's suggestion of longer hours, including evening sessions and weekends, was rejected by Conger, the Company's attorney and chief negotiator (J.A. 15, 141; 458–461).

[6] The Company's contract offer of February 15, included *inter alia*, provisions which decreased the area of arbitrable disputes, increased management prerogatives and otherwise re-

jected this offer and questioned the Company as to what practices it would follow after expiration of the contract. Kohler's negotiators indicated that the Company would "continue the past practice and operate along the lines of the expiring contract" (J.A. 170, 31; 600).

Several more meetings were held in the early part of March without any progress. The Company rested on its alternative offers of February 25 and 26—either to renew the 1953 contract "without a general wage increase," or to grant a three-cent increase conditioned on acceptance of the Company's February 15 offer with any changes agreed upon to date (J.A. 16, 143; 466–468). On March 14, the Union membership voted overwhelmingly to reject that offer, and to authorize the Union executive board to call a strike (J.A. 17; 389–399; 604–605). The following day, Kohler commenced strike preparations similar to those of February and August 1953 (J.A. 17, 138–139; 1061–1065, 1066–1067). On March 18, the watchtowers were re-erected and floodlights were installed (J.A. 17; 1063–1064). The Union, as before, set up soup kitchens and sound trucks (J.A. 17).[7]

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solved various so-called ambiguities of the 1953 contract in a manner advantageous to the Company (J.A. 162; 757–759, 1114–1115, 1119–1120, 1130–1246).

[7] In this period, Company foremen, by threats and promises of benefit, sought to deter Union Steward Majerus from presenting employee grievances under the contract (J.A. 49–51, 217–218, 223). Moreover, the Company declined to furnish the Union with information respecting the incentive earnings of machine operators in the Brass Die Department, which was relevant to a pending grievance (J.A. 29, 155–156).

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Further meetings were held between March 17 and April 3, with the Company continuing to offer only its alternate proposals of February 25 and 26. The Union continued to reject them as unacceptable, but expressed a willingness to negotiate on all the issues (J.A. 17, 144; 467–473, 613–614, 1403–1404, 1547–1549, 1574, 1591–1592). At the moment of break-off on April 3, with the strike scheduled for April 5, Conger, the Company's chief negotiator, noted that he had seen the strike coming for a long time. Howe, one of the Company attorneys, added that, "If we must have a showdown, it might as well come now." (J.A. 18, 140; 475.)

C. THE PERIOD FROM APRIL 5 TO MAY 28

The strike commenced on Monday morning, April 5. From that date to May 28, except for three days early in May, the plant was shut down. There was mass picketing by up to 2,500 pickets. Violence erupted in many instances, and the Union engaged in so-called "belly-to-back" picketing, with roving patrols, which prevented non-strikers from entering the plant. (J.A. 65–66, 242–243.) This type of picketing ceased on May 28, pursuant to an order of the Wisconsin Employment Relations Board,[8] and the parties agreed to resume negotiations as of June 1, when the plant reopened (J.A. 182–187).

D. THE UNILATERAL WAGE INCREASE OF JUNE 1

As the plant reopened and the parties were preparing to resume negotiations Kohler, unilaterally and

[8] See *Auto Workers* v. *Wisconsin Board*, 351 U.S. 266.

without notice to the Union, instituted a three-cent wage increase and at the same time kept in effect the old contract terms (J.A. 31, 171; 419, 878, 2459). Although the wage increase was made effective as of April 5, the actual date of its institution, as found by both the Trial Examiner and the Board, was on or about June 1 (J.A. 34–38; 171–172, 1124, 1157–1158, 1887–1889). Thereafter, the parties returned to the bargaining table, but the Company continued to deny the Union the opportunity of accepting the terms which the Company had unilaterally given to the employees (the 1953 contract plus the three-cent increase)—terms which were more favorable than any previously offered to the Union. Its explanation was that it would not reward the Union for having struck. (J.A. 31, 33–34, 168–169, 176; 507–510, 516–517, 531, 662, 668, 1297–1298, 1582, 1589, 1846–1847.)

E. EVENTS SUBSEQUENT TO JUNE 1

1. *The Company's unilateral and discriminatory action with respect to the Shell Department employees.*—Although the bargaining resumed in June, the strike and peaceful picketing continued. One of the topics discussed in the renewed negotiations was the disposition of temporary employees in a Shell Department which had been making munitions for the government under a contract that was about to expire. On July 1, Kohler discharged the 53 Shell Department employees who were on strike, and transferred to other departments the 29 Shell Department employees who were not on strike. In its prior dicussions with the Union, Kohler had never indicated that it contem-

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plated such disparate treatment for the Shell Department employees. (J.A. 176–179; 499–503, 584–586, 619–620, 632–634, 866–870, 1551–1552.)

2. *The Company's failure and refusal to furnish pertinent wage information.*—Since October 1953, the Union had made several requests for information bearing on wage inequities and incentive payments. While acknowledging that the data sought was relevant and pertinent to the bargaining negotiations, Kohler did not furnish any of it until August 1954, although it had prepared data sheets on June 14. When finally presented, the data sheets contained only a part of the information requested. Despite several subsequent requests, the remainder of the information was never supplied. (J.A. 20–29, 148–154, 155; 544, 582–583, 810–811, 1194–1197, 1359–1362, 1532–1539, 1587–1588, 886–887.)

3. *The Company's refusals to bargain in September 1954.*—At the beginning of September 1954, Judge Murphy, the state court judge who had enforced the order of the Wisconsin Board banning mass picketing and violence (p. 7, *supra*), began exhaustive efforts to settle the outstanding issues between the parties. At the very outset, the Company took the position that "any further meetings would be futile." It repeatedly rejected the Union's offer, conveyed through Judge Murphy, to settle the strike for a slight increase in wages; it stated that "there would be no increase." The Company adamantly adhered to this position, even when assured by Judge Murphy that the Union was willing to drop most of its other demands if it could secure a slight raise over

the increase instituted on June 1. The Company continued to offer the three-cent per hour raise already put into effect, on condition that the Union abandon its claims on virtually all other issues. Conger stated that the bitter strike in 1934 had resulted in twenty years of labor peace, and he "was going to insist that this strike bring to the Company twenty years of labor peace." (J.A. 169, 192–195; 956–992, 972–973.)

4. *The continuing refusals to bargain after September 1954; the unilateral wage increase of August 5, 1955.*—Between the end of September 1954 and August 1955, the Company and the Union met on several occasions, but these meetings were no more fruitful than before. When, at one of these meetings, the Union started to discuss the issues, Conger stated that, unless the Union accepted the Company's last offer, there would be no point to continuing the meeting. Moreover, Kohler continued to reject the efforts of neutral parties to bring about a compromise, taking the position that "the only thing the union has to 'compromise' is *demands* for something it does not have and never did have." Meanwhile, on August 4, 1955, the Company informed the Associated Press that a wage increase would be granted, retroactive to August 1. Although the question of wages had been on the agenda of the negotiations just before this action, the parties had not discussed the subject, the negotiations having foundered on the issue of reinstatement of strikers. The Union first learned of the wage action through the press reports, and protested the Company's

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unilateral action. Thereafter, on August 5, Kohler officially notified the Union of its decision. (J.A. 203–210; 515–521, 727–728, 1187–1193, 1847–1848, 1217–1219; G.C. Exs. 97, 99, 1477.)

5. *The Company's other actions.*—During this period, Kohler also engaged in other anti-union acts. The Company unilaterally decided to rehire the temporary employees in the Shell Department who had been on strike (*supra,* pp. 8–9), but afforded them even less seniority than that accorded new employees (J.A. 178, 180); it discharged and refused to reinstate employee Dottei because of his strike activity (J.A. 73, 74, 259); it evicted striking employees from company-owned rooms and homes (J.A. 226–228, 232); it induced, by promise of increased benefits, one of its valuable employees, Forstner, to abandon the strike (J.A. 47–49, 218–219, 224–225); and it extensively used detectives to engage in surveillance of Union activities and anti-Union espionage (J.A. 60–63, 386–391).

F. THE DISCHARGE OF STRIKERS FOR MISCONDUCT

Although mass picketing by striking employees barred ingress to the plant from April 5 through May 28, 1954 (*supra,* p. 7), the picketing thereafter did not have that effect. During the month of August 1954, however, a series of demonstrations occurred around the homes of various non-strikers. Only a small percentage of those present were strikers; the crowds were made up mainly of neighbors, passers-by and sympathizers with the Union. Moreover, during December 1954 and January 1955,

groups of pickets patrolled in front of the Company's employment office. Generally, these groups attempted to impede the entrance of job applicants into the office. (J.A. 65–66, 69–70, 242–243, 246–250.)

Kohler first indicated that it was going to discharge certain striking employees for misconduct during the September meetings with Judge Murphy. On February 18, 1955, the Union wrote Kohler, demanding the right to negotiate concerning the strikers whom the Company would not reinstate. On March 1, 1955, the Company notified 91 strikers, who allegedly participated in misconduct during the strike, that they would not be reinstated because of the misconduct. That same day, the Company wrote the Union informing it of the action taken. At no time did Kohler comply with the Union's demand to bargain over the discharges. (J.A. 204; 435, 682–686, 1298–1299; G.C. Exs. 76, 81, 82.)

II

THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that Kohler, in violation of Section 8(a)(5) and (1) of the Act, refused to bargain in good faith with the Union on and after June 1, 1954, by unilaterally putting into effect wage increases; by discharging the striking Shell Department employees and transferring the non-striking employees in that Department without notification to or consultation with the Union; by delaying and refusing to furnish certain pertinent wage information for purposes of bargaining; and by otherwise failing to meet its statutory obligations to negotiate in good faith (J.A. 23–24,

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26, 28–32, 41, 43, 46, 151–156, 179–182, 199–200, 203). The Board also found that Kohler violated Section 8(a) (3) and (1) by discriminating against the Shell Department employees and discharging Dottei because of their participation in strike activities (J.A. 40–41, 179–182). Finally, the Board found that Kohler interfered with, restrained and coerced its employees, in violation of Section 8(a)(1), by engaging in surveillance and anti-union espionage, by evicting certain strikers from Company-owned dwellings, and by certain other conduct (J.A. 40–41, 42, 47–49, 52, 61, 218–219, 224–225, 232, 233–234, 392–393).

The Board, with one Member dissenting, further found that, in the negotiations preceding the strike which began on April 5, 1954, there was no generalized refusal to bargain in good faith on Kohler's part (J.A. 13, 18–20, 29–30, 138–139, 144–147).[8] It thus concluded that the strike was not caused by unfair labor practices but by the failure of the parties to agree on a contract. The Board found, however, that the strike, though economic at its inception, was prolonged, and thereby converted into an unfair labor practice strike, by the violations of Section 8(a)(5), (3) and (1) committed by the Company on and after June 1, 1954. (J.A. 38–41, 43, 46, 62, 361, 391–392.)

Since the strike had been converted into an unfair labor practice strike, all strikers not replaced as of June 1, 1954, were entitled, upon application, to be reinstated to their former positions unless they had

[8] The Board found a refusal to bargain only with respect to the refusal to furnish information relating to the Brass Die Department (n. 7, *supra*), but concluded that this was unrelated to the contract negotiations (J.A. 29).

engaged in such misconduct as would disqualify them for reinstatement. The Board found that 77 of the 91 employees discharged by the Company had engaged in mass picketing, the home demonstrations, and the office picketing, and that these activities were serious enough to disqualify those employees for reinstatement. (J.A. 69, 73.)

The Board ordered Kohler to cease and desist from the unfair labor practices found. Affirmatively, the Board ordered Kohler, *inter alia*, to bargain in good faith with the Union; to reinstate, upon application, all the striking employees to their former or substantially equivalent positions, except the 77 who the Board found were lawfully discharged for misconduct; and to dismiss, if necessary, any replacements hired after June 1, 1954. (J.A. 78–83.)

III

THE DECISION OF THE COURT OF APPEALS

The court of appeals, Chief Judge Miller dissenting, held that all of the Board's unfair labor practice findings were "amply supported by the record considered as a whole" (App. 4a), and enforced the Board's order remedying those unfair labor practices (App. 16a, 25a).

The court remanded the case to the Board for further consideration, however, insofar as the Board had found that 77 employees had disqualified themselves for reinstatement, and that the strike had not been caused by unfair labor practices.[10] In the court's view, the Board, in determining that the misconduct

[10] The Union had filed a petition to review challenging these findings.

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of the 77 employees was sufficient to disqualify them for reinstatement, had erred in failing to weigh the extent of their misconduct against the Company's unfair labor practices (App. 6a–12a). Moreover, the court concluded that the grounds on which the Board had found that the strike was not an unfair labor practice strike at its inception were inadequate (App. 12a–15a).

ARGUMENT

The questions raised by the petition turn essentially upon an appraisal of the evidence in this particular case, many of which may be rendered academic by the supplemental decision to be issued by the Board, after it considers the matters remanded by the court below.[11] There is no conflict of decisions. No further issue warranting review by this Court is presented.

1. Petitioner contends (Pet. 18–25) that it was denied the right to adduce additional evidence to prove that its unilateral wage increase was actually given on April 5, 1954, rather than on June 1, 1954,[12] the date on which the Board found the increase was granted and the economic strike was converted into an unfair labor practice strike. The question as to the date of the wage increase is significant only because of the Board's finding that the strike became an unfair labor practice strike on June 1 (see the Statement, *supra*, p. 13). Apparently, petitioner's theory is that if the wage increase had been granted on the

[11] The Board has decided not to seek review of the order of the court of appeals remanding the case.

[12] There is no dispute that the increase was put into effect as of April 5, 1954. The question is whether this was a retroactive date (as the Board found), or also the date when the increase was first announced (as petitioner contends).

earlier date, when the strike began and all negotiations ceased, the Board could not have found that the unilateral increase was a refusal to bargain which changed the economic strike into an unfair labor practice one.

But, the court below has directed the Board to reconsider whether other conduct of the Company, which antedated the wage increase (whether its date be June 1 or April 5), made the strike an unfair labor practice strike from its inception. On remand, if the Board were to find, based on such conduct, that the strike had been an unfair labor practice strike from its inception, the actual date of the wage increase would be irrelevant to any material issue in the case. Moreover, even if after reconsideration the Board were to adhere to its original view that the earlier conduct had not affected the strike, the actual date of the unilateral wage increase would still be of no practical significance. For, as the Board indicated in its decision (J.A. 35, n. 34, 174), it would find that the wage increase had violated the Act, and thus would have contributed to the strike, regardless of when announced.[13]

In any event, there is no merit to petitioner's contention that it was improperly denied the right to prove that the wage increase was actually given on April 5. The allegations in the complaint were

[13] Petitioner's assumption that the Board could not find that the wage increase was unlawful if it had been given on April 5 rests on an erroneous premise. Thus, the General Counsel stipulated at the hearing before the Trial Examiner (J.A. 182–183) that, because of the Union's mass picketing in that period, Kohler's refusals to meet with the Union during April and

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sufficient to apprise Kohler that the exact date of the wage increase was a litigable issue; the original complaint gave the date as "on or about April 5, 1954," and an amendment to the complaint (made December 3, 1954) charged a generalized refusal to bargain "from February 1954 to date" (J.A. 1934–1935, 1956–1957).[14] Moreover, the record shows that petitioner was afforded full opportunity to, and did, litigate the date on which the wage increase was announced. Both Conger, the Company's chief negotiator, and Herbert Kohler, its president, testified in the hearing before the Trial Examiner respecting the date of the increase, and Conger made further statements regarding the date in oral argument before the Examiner. Their testimony and statements support the Board's finding that the wage increase

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May would not be considered in determining whether the Company had refused to bargain. But, contrary to petitioner (Pet. 15), this picketing did not give Kohler *carte blanche* to engage in affirmative action, such as the unilateral wage increase here, which, being more favorable than that previously offered the Union, could only impair the bargaining process and disparage the statutory representative.

Since the plant did not operate between April 5, the start of the strike, and June 1 (see the Statement, *supra*, p. 7), the reinstatment rights of the strikers would be the same whether the strike be viewed an unfair labor practice strike from its inception, or only from June 1.

[14] The Act "does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity." *National Labor Relations Board* v. *Piqua Munising Wood Products Co.*, 109 F. 2d 552, 557 (C.A. 6). See also *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. 2d 432, 434–435 (C.A. 7); *Carpinteria Lemon Ass'n* v. *National Labor Relations Board*, 240 F. 2d 554, 558 (C.A. 9), certiorari denied, 354 U.S. 909.

was first instituted on June 1, though made retroactive to April 5.[15] (See J.A. 36–37, 171; 419, 1123–1124, 1887–1889.) Finally, the additional evidence which petitioner sought to introduce as to the date of the wage increase was tendered ten months after issuance of the Trial Examiner's intermediate report; it consisted of a "Bulletin of Supervision," allegedly sent to over 300 of the Company's supervisors, and two affidavits by Company officials (App. 43a–44a). There was no showing that this information was unavailable at the time of the original hearing. Indeed, as the Board found (J.A. 38, n. 37, 2020), the evidence could have been available. For all these reasons, the Board and the court below (App. 45a) were amply justified in denying petitioner's motion for leave to adduce additional evidence on the date of the wage increase. See *National Labor Relations Board* v. *Weirton Steel Co.*, 135 F. 2d 494, 497 (C.A. 3); *National Labor Relations Board* v. *West Kentucky Coal Co.*, 152 F. 2d 198, 200–202 (C.A. 6).[15a]

[15] During the oral argument before the Examiner, the latter repeatedly requested Conger to fix the date of the wage increase, pointing out that the Company's "payroll books would show it." Conger answered that "unfortunately" the books did not show when the wage increase was instituted, and added that he "would be inclined to think," as did the Trial Examiner, that it was "probably put into effect about May 28," because "that was about the only time it had become important and that is probably when we started thinking about it" (J.A. 1888).

[15a] The Board's position with respect to Kohler's motion for leave to adduce additional evidence is more fully set forth in the opposing memorandum filed by the Board in the Court of Appeals. A copy of the Board's opposition has been filed with this Court.

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2. Petitioner also contends (Pet. 25–36) that, even if the wage increase had been instituted on June 1, 1954, and had constituted an unfair labor practice, the Board erred in finding that it prolonged the strike. The question whether the wage increase prolonged the strike would lose significance were the Board, upon remand, to find that the strike was an unfair labor practice strike from its inception (see *supra*, pp. 15–16). It is also a purely factual question, and therefore does not warrant review by this Court. The Board's finding, sustained by the court below, is supported by substantial evidence. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503.[16]

[16] Petitioner contends (Pet. 27) that the strike would not have ended even absent the unfair labor practices because the Union's economic demands far exceeded what the Company had given the nonstrikers. But, without the unfair labor practices, the Union may have been more willing to scale down its demands. In short, where there are economic and unfair labor practice reasons for prolonging a strike, the burden is on the tortfeasor to disentangle the two factors, and this petitioner cannot do. See *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, 245 F. 2d 594, 597 (C.A. 5); *National Labor Relations Board* v. *West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9).

There is no merit to petitioner's further contention (Pet. 32–36) that the Union itself contributed to the prolongation of the strike by insisting as a condition of settlement on the reinstatement of all striking employees, including those whom the Company allegedly discharged for misconduct. The bulk of the unfair labor practices which the Board found contributed to the prolongation of the strike took place long before the negotiations in July and August 1955, when the reinstatement question first arose as a serious issue dividing the parties. It is at least arguable that, had Kohler bargained in good, rather than in bad, faith from June 1, 1954 on, the reinstatement issue of July–August 1955 might never have arisen.

3. Petitioner's contention (Pet. 36–41) that the court below exceeded its reviewing function in remanding the case to the Board for reconsideration of the question whether the strike was an unfair labor practice strike from its inception, likewise presents no issue warranting review. Contrary to petitioner, the court below did not undertake to reweigh the evidence or to displace the Board's choice between two fairly conflicting inferences. The court was of the view that the Board had applied erroneous principles, and ordered the Board to reconsider the question whether the strike was caused by unfair labor practices, free of these erroneous principles. At the same time the court made it clear that it was not telling the Board what weight it should accord the past events (App. 15a). Certainly it is within the competence of a reviewing court, upon finding that an administrative agency has applied an erroneous principle of law, to remand the case to the agency for reconsideration in the light of the correct principle.

4. Finally, no question warranting review is presented by the action of the court below in directing the Board, in considering whether the 77 strikers found to have engaged in mass picketing and similar acts were disqualified for reinstatement, to evaluate such misconduct against petitioner's unfair labor practices and the general background of the dispute (Pet. 41–48). Here, as with the issue of the date of the wage increase (*supra*, pp. 15–16), the Board might deprive the issue of all practical significance by concluding that the misconduct of the strikers, even when viewed in the light of the factors indicated by

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the court, was so serious that it afforded sufficient cause for discharge and that reinstatement would not effectuate the policies of the Act. Cf. *H. N. Thayer Co.*, 115 NLRB 1591, following the remand ordered in *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883. On the other hand, if the Board, after reconsideration in the light of the court's ruling, should conclude that some or all of the 77 strikers were not disqualified for further employment and order them reinstated, petitioner could, upon judicial enforcement of that order, petition this Court for review of the order and the principles on which it was based. There is accordingly no occasion for this Court to consider the issue at this stage of the proceeding.

In any event, the court below properly directed the Board to examine this issue on remand. Where, as here, a strike is caused or prolonged by employer unfair labor practices, the fact that the strikers have engaged in certain misconduct which removes their strike activity from the protection of Section 7 of the Act does not necessarily preclude the Board from ordering them reinstated, should they be discharged for engaging in that misconduct. There are still the employer's unfair labor practices to consider, and, under Section 10(c) of the Act, reinstatement may be an appropriate remedy if it would "effectuate the policies of the Act."[17] Accordingly the Board may weigh the

[17] Section 10(c) provides that, if the Board finds that a person has engaged in an unfair labor practice, it shall issue an order requiring him "to cease and desist from such unfair labor

strikers' misconduct against the provocation furnished by the employer's unfair labor practices and determine whether, on balance, the policies of the Act would best be served by reinstating the strikers notwithstanding the misconduct.[18] The court below, finding that the Board had not made this evaluation before concluding that the 77 strikers should not be reinstated, has merely directed the Board to do so.

Contrary to petitioner (Pet. 45–47), *National Labor Relations Board* v. *Fansteel Corp.*, 306 U.S. 240, does not preclude the Board from giving consideration to the employer's unfair labor practices in determining whether employees engaging in strike misconduct have forfeited their right to reinstatement. The sit-down and forcible possession of the plant in that case, unlike the type of misconduct here, made the *Fansteel* strike unlawful from its inception. Accordingly, in holding that the employer's unfair labor practices there did not justify the flagrant misconduct on the part of the employees in that case, the Court did not necessarily rule out that factor in other cases. Indeed, the Court's opinion in *Fansteel* makes clear that it was the particular circumstances, not the irrelevance of

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practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act." It further provides that: "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

[18] See *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2nd 748, 752–753 (C.A. 1), certiorari denied, 348 U.S. 883; Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 324, n. 24 (1951).

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employer unfair labor practices generally, which led to the conclusion that reinstatement was not warranted despite the employer provocation."[19]

Petitioner also contends that the evaluation directed by the court below is inconsistent with the 1947 amendment to Section 10(c), precluding the Board from reinstating an employee discharged "for cause" (see n. 17, *supra*). Here again, there is no occasion for further review by this Court at this time, because the decision of the court below leaves it open to the Board, on remand, to determine whether that provision would in any event preclude the Board from ordering reinstatement of any of the 77 strikers discharged for mass picketing and related misconduct (see App. 10a–12a).

[19] The Court stated (306 U.S. at 258, emphasis added): "We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed *in this instance* would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure. * * * [W]hatever discretion may be deemed to be committed to the Board, its limits were transcended *by the order under review*."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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